

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

337

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,240

JAMES L. BUNDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 7 1967

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(Appointed by this Court)

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UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WYOMING

SECTION 16

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BUREAU OF LAND MANAGEMENT

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STATEMENT OF QUESTIONS PRESENTED

1. Can a conviction on housebreaking be allowed to stand where the Government failed to put on any evidence as to corporate ownership of the premises and/or ownership of the business conducted on said premises?

2. Can a conviction on unauthorized use of a motor vehicle be allowed to stand where the Government failed to call the owner of the motor vehicle to prove lack of consent or authorization?

3. Should convictions be allowed to stand where the Government places into evidence previous minor convictions so as to cause prejudice and prevent a fair trial?

IN THE
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No. 21,240

JAMES L. BUNDY,

Appellant,

vs.

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Appellee.

Appeal in Forma Pauperis from a Judgment of Conviction of the United
States District Court for the District of Columbia for Violation of
Sections 1801 and 2204, Title 22, District of Columbia Code.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

On September 6, 1966, James L. Bundy was indicted in the United States District Court for the District of Columbia on three counts.

Count 1 - Violation of D. C. Code 22-1801 (Housebreaking)

Count 2 - Violation of D. C. Code 22-2201 (Grand Larceny)

Count 3 - Violation of D. C. Code 22-2204 (Unauthorized Use of Motor Vehicle)

On September 16, 1966, he pleaded not guilty to all counts. Following trial of the case on June 19, 1967 and June 20, 1967, he was convicted on Counts 1 and 3 and acquitted on Count 2 and on July 28, 1967 was sentenced by the Court to three (3) to nine (9) years on Count 1 and one (1) to three (3) years on Count 3, said sentences by the counts to run concurrently.

The United States District Court for the District of Columbia had jurisdiction as provided by D. C. Code 11-306 and 11-521.

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction of this appeal as provided by 28 U.S.C., Secs. 1291 and 1294.

STATEMENT OF THE CASE

Appellant, James L. Bundy, was named in a three-count indictment filed in the United States District Court for the District of Columbia on September 6, 1966, charging him with having committed the offenses of housebreaking, larceny and unauthorized use of a vehicle.

The first count alleged that on or about August 10, 1966 appellant "entered the building of Rickard & Davis, Inc., a body corporate, with intent to steal property of another."

The second count alleged that on or about August 10, 1966 appellant "stole property of Rickard & Davis, Inc., a body corporate, in excess of \$100.00, consisting of one safe, of the value of \$300.00, cigarettes and money the exact amount of which is to the Grand Jury unknown."

The third count alleged that on or about August 11, 1966 the appellant "feloniously did take, use, operate and remove, one certain automobile, property of Elizabeth V. King, and in the custody of Donald Weston, from a certain space, and did operate and drive said automobile, for his own profit, use, and purpose, without the consent of Elizabeth V. King, the owner

of said automobile, and without the consent of Donald Weston."

The case came on for trial on June 19, 1967. The Government's case consisted of the following:

James E. Sprowls of the Metropolitan Police Department testified he arrested James L. Bundy at 617 - 15th Street, N. E. at 1 P. M. inside the pantry closet in the kitchen on the first floor (Tr. 4-6); that the officer did not have a warrant in his possession at the time of apprehending the appellant (Tr. 10).

Wayne B. King, 720 Girard Street, N. E., testified that he has a gasoline station; that his mother's name is Elizabeth V. King and that she owns a 1964 Imperial Chrysler. He identified a registration card marked Government's Exhibit No. 1 which showed the car in his mother's name (Tr. 14). Counsel for appellant objected to the registration card being accepted into evidence. Elizabeth V. King did not appear in Court and was stated to be home and sick for the last year (Tr. 15). The registration card was admitted into evidence showing Elizabeth V. King to be the owner of the automobile. That on August 9, 1966 he (the owner's son) took this car to Rickard & Davis, Inc. at 1600 Bladensburg Road, N. E., Washington, D. C. and he identified Donald E. Weston as the person he left it with at Rickard & Davis, Inc. (Tr. 17). That

Rickard & Davis order form was marked Government's Exhibit No. 2 and he identified his signature thereon. It showed the car there for repairs (Tr. 19). He denied he knew the appellant and denied he authorized Mr. Weston or Rickard & Davis to allow appellant to drive the automobile (Tr. 20).

Donald Eugene Weston testified he was shop foreman for Rickard & Davis, Inc. at 1636 Bladensburg Road, N. E., Washington, D. C. That he did not give permission to appellant to drive the automobile (Tr. 26). That appellant was not employed by Rickard & Davis, Inc. and that said concern has never had a night watchman. That on August 10, 1966 he opened the shop at 6:55 A. M. and saw a window broken in the rear to the left of the walk-in room (Tr. 27). The cigarette machine was broken into and the safe was missing (Tr. 28). He did not know if anything was taken from the cigarette machine, coke machine or the safe.

Robert W. Taylor testified he was the sales manager of Rickard & Davis, Inc. and that he secured their premises at 9 P. M. on August 9, 1966. That the next morning at 8:15 A. M. when he returned he observed that one of the rear windows of the premises had been broken, a cigarette and coke machine demolished, the office ransacked and the safe and file cabinet removed (Tr. 31). He did not know the appellant and stated that

appellant was never employed by Rickard & Davis, Inc. and that Rickard & Davis, Inc. did not have a night watchman on the premises in August, 1966 (Tr. 34). That appellant did not have authority to enter the premises of Rickard & Davis, Inc. on August 9, 1966 at that time (Tr. 35).

Jonathan Scott of the Metropolitan Police Department testified that on August 9, 1966 going into the morning of August 10, 1966 he was in uniform and drove onto the premises of Rickard & Davis, Inc. and looked in a window and saw a man inside the building (Tr. 38). That he identified the appellant as the man in the building. That he was told by him that he was the night watchman and he asked and was shown identification papers which showed the name of James L. Bundy, 617 - 15th Street, N. E. He was told it was his first night as night watchman (Tr. 38). He was with him for about 15 minutes. On cross-examination, he stated the person in Rickard & Davis, Inc. was waving to him when he first saw him. That the identification card he saw he believed to be a military card with no picture of identification (Tr. 41). That he used the telephone at Rickard & Davis, Inc. to make a report to the police station. He described the man he saw as being in his early 20's, no glasses and without a shirt. He had never seen him previously.

Peter Joseph Zarcone of the Metropolitan Police Department testified on August 11, 1966 he had an arrest warrant for James Lewis Bundy (Tr. 46). At about 4:23 A. M., he went to 617 - 15th Street, N. E. While on the front steps, he saw a blue Imperial automobile slow down and then take off at a high rate of speed, observed its tag number to be 180-687 D. C. (Tr. 47). He proceeded to follow the Imperial automobile, pulled up alongside it and recognized Bundy. He then told him to pull over to the side but instead the car took off and eventually crashed in front of 1541 North Carolina Avenue. That James L. Bundy was driving the car (Tr. 49). That he had met Bundy on two (2) other occasions and had spoken to him before. That he did not have an arrest warrant for James L. Bundy with him at that time but did have knowledge of a felony arrest warrant for him (Tr. 52).

That counsel for defendant objected and stated he was not satisfied with proof of the corporation status (Tr. 53).

At the conclusion of the Government's case, appellant moved for a judgment of acquittal. Further, counsel asked for ruling by the Court on admissibility of the conviction record of the defendant for impeachment purposes (Tr. 56-62). Judgment for acquittal was based on the officers not having an arrest warrant; that the arrest was illegal and that there was insufficient evidence and a

lack of proper identification. That there was insufficient testimony as to the goods and ownership or possession thereof (Tr. 67). That the registration card should be stricken from the evidence on the grounds that the person having custody of same did not testify. The motions for judgment of acquittal, quash the indictment and to strike the registration card were all denied by the Court (Tr. 67).

For the defense, James L. Bundy testified that his wallet, draft card and money were taken from him during the last part of July, 1966 in a beer hall fight (Tr. 70-71 and 78). That he never recovered the draft card and social security card. That on August 9, 1966 he worked on a starter till about 8:30 P. M. Thereafter, he stopped at a liquor store and then went to a house with two (2) friends and had something to eat. That thereafter he went to a bootlegger's and sat and drank and got home about 12:30 A. M. on the morning of August 10, 1966. He denied being at Rickard & Davis, Inc. on August 9, 1966 or August 10, 1966. That he did not know Officer Jonathan Scott. That he did not work the full day on August 11, 1966 as he was sick from drinking (Tr. 73). That night or next morning three (3) officers not in uniform chased him upstairs and removed him from the broom closet. That he hid in the closet because he thought they were from Harrisburg, Pennsylvania where he had been threatened in a gambling matter.

That he had a mustache and a piece of hair under his lip in August of 1966. He denied he was in the automobile that the police officer saw at the stop sign (Tr. 77).

On cross-examination he said that he reported the loss of his wallet, draft card and social security card to No. 14 Police Precinct (Tr. 78).

That he was asked by the District Attorney if he was the same James L. Bundy that was convicted of simple assault in General Sessions in 1964. He was also asked if he was the same James L. Bundy who was convicted of petty larceny in the Court of General Sessions in 1964. He responded he was in both cases (Tr. 80).

Officer Scott was recalled by the Government and stated that the person he spoke to in Rickard & Davis, Inc. had upper teeth which were broken.

The jury convicted James L. Bundy on Counts 1 and 3, housebreaking, entering the building of Rickard & Davis, Inc., a body corporate, with the intent to steal, and unauthorized use of an automobile belonging to Elizabeth V. King, in the custody of Donald Weston, without the consent of Elizabeth V. King, owner of said automobile, and without the consent of Donald Weston.

James L. Bundy was acquitted on Count 2 which charged him with larceny of a safe, cigarettes and money in an unknown amount.

STATUTORY PROVISIONS INVOLVED

22 D. C. Code, Sec. 1801 (Housebreaking)

"Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

22 D. C. Code, Sec. 2204 (Unauthorized Use of Vehicle)

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not

exceeding five years, or both such fine and imprisonment."

STATEMENT OF POINTS

1. The Trial Court erred in overruling appellant's motion for a directed verdict of acquittal since the Government failed to establish ownership of the premises allegedly entered and/or ownership of the business conducted on said premises.

2. Failure to prove the corporative status entitled the defendant to an acquittal.

3. That the introduction of the previous criminal convictions by the Government was for the sole purpose of prejudicing the jury against the defendant and affected his substantial rights and deprived him of a fair trial.

4. It was essential to produce the owner of the car, Elizabeth V. King, to show no consent or authorization by her.

5. That ownership of the motor vehicle was not established by the best evidence and property not positively identified as to ownership cannot be the basis for a criminal prosecution.

6. That the evidence presented was insufficient to establish beyond a reasonable doubt that the corporate premises of Rickard & Davis, Inc. was the subject of housebreaking.

7. That the evidence presented was insufficient to establish that

(A) the automobile belonged to Elizabeth V. King, and

(B) that it was used without her consent.

SUMMARY OF ARGUMENT

Appellant was found guilty of housebreaking and unauthorized use of a motor vehicle.

No evidence was presented during the trial to establish the ownership of the building or the ownership of the business in the building.

No evidence was presented by the owner of the motor vehicle to establish lack of consent or authorization.

The Government was allowed to place into evidence previous minor convictions of appellant which prevented the appellant from having a fair trial.

ARGUMENT

I

NO EVIDENCE WAS PRESENTED DURING THE TRIAL TO ESTABLISH OWNERSHIP OF THE BUILDING OR THE BUSINESS

The appellant was charged by indictment of entering into the building of Rickard & Davis, Inc., a body corporate, with intent to steal property of another.

The Government did not call any official from the alleged corporation to establish ownership of the building or the business on the premises. There is a total lack of any evidence sufficient to establish the corporate character of the owner of the property entered and/or the business on the premises.

In Bord v. United States, 76 U.S.App. D. C. 205, 133F(2) 313, a conviction of housebreaking was upheld based on testimony of the assistant manager of the theater and a representative of Warner Brothers, testifying as to the incorporation of Warner Brothers and that it occupied the theater; the Warner Brothers' representative also identified an imprint of the corporate seal; and, it was shown that the Stanley Company of America, a Delaware corporation, paid taxes on the theater building.

The holding of the Bord case is to the effect that the owner or occupant of the premises may be proven by evidence which shows the corporation was de facto organized and acting as such.

In the present case, two employees of Rickard & Davis, Inc. were produced by the Government. One was a shop foreman and the other the sales manager. Neither testified concerning the identity and corporate character of the owner or occupant. No evidence ever was entered into the case which showed or tended to prove by "reputation" or any other means the corporate status of the owner and/or occupant of the premises involved.

The failure of the Government to prove the identity and character of Rickard & Davis, Inc. as a corporation was the subject matter of objection by the appellant (Tr. 53). All essential allegations must be proven. They were not. Accordingly, the housebreaking conviction of the appellant must be reversed. Bord v. United States, 76 U.S.App.D C. 205; Bimbo v. United States, 65 App.D.C.; 82 F(2) 852; 13 Am. Juris(2), Para. 37, Page 342.

II

PREVIOUS MINOR CRIMINAL CONVICTIONS PREVENTED A FAIR TRIAL

The sole and only purpose of the Government interrogating the appellant about his criminal record was to prejudice the jury

against the defendant (Tr. 80). Ostensibly, the convictions were the subject of interrogation on the alleged grounds of credibility. The appellant should have been tried for the charges levied against him at the time of the trial and any reference to any previous convictions or involvement in any other criminal matter should not have been alluded to by the Government. Reference to same affected the substantial rights of the appellant and deprived him of a fair trial. Luck v. United States, 121, U.S.App.D.C. 151, 348 F(2) 763.

D. C. Code 14-305 says in effect that a person who has been convicted of a crime can testify but the fact of his having been convicted of a crime may be given in evidence to affect his credibility as a witness. The "crime" referred to in that code provision does not mean matter misdemeanor and not of a felony character. "The basis of admissibility of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral turpitude makes them unworthy of trust in testifying. This theory, however, has little or no basis in the violation of municipal ordinances or for that matter misdemeanors, involving no element of inherent wickedness." See: Clavans v. District of Columbia, 61 App.D.C. 298, 62 F(2) 383.

The convictions put into evidence by the Government were that of simple assault and petty larceny. Such insignificant matters should not be allowed into the case so as to prejudice the rights of

the appellant and deprive him of a fair trial.

III

THERE IS NO PROOF TO SHOW THE LACK OF CONSENT OR AUTHORIZATION OF THE OWNER OF THE MOTOR VEHICLE


D. C. Code 22-204 provides that use of a motor vehicle without the consent of the owner shall be a violation of said code section. The owner of the car, Elizabeth V. King, never testified that her motor vehicle was used without her consent and in fact she never testified. Her son said she was sick and there is no formal record explaining her absence except the statement of her son.

That lacking the proof of no consent by the owner herself, the conviction of the appellant of having violated D. C. Code 22-2204 must be reversed. 32 Am. Juris, Para. 32, Page 908.

CONCLUSION

Wherefore, this Court should reverse the judgment of the Trial Court and remand the case to the Trial Court with instructions to enter a judgment of acquittal.

Respectfully submitted,


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Attorney for Appellant
(Appointed by this Court)

September 6, 1967

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Respectfully submitted,


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Attorney for Appellant
(Appointed by this Court)

September 6, 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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for the District of Columbia Circuit

No. 21,240

FILED JAN 1 1968

Nathan J. Paulson
CLERK

JAMES L. BUNDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING EN BANC

Benjamin F. Rossner
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Washington, D. C. 20006
Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Can a conviction on housebreaking be allowed to stand where the Government failed to put on any evidence as to corporate ownership of the premises and/or ownership of the business conducted on said premises?

2. Can a conviction on unauthorized use of a motor vehicle be allowed to stand where the Government failed to call the owner of the motor vehicle to prove lack of consent or authorization?

3. Should convictions be allowed to stand where the Government places into evidence previous minor convictions so as to cause prejudice and prevent a fair trial?

SUMMARY OF ARGUMENT

Appellant was found guilty of housebreaking and unauthorized use of a motor vehicle.

No evidence was presented during the trial to establish the ownership of the building or the ownership of the business in the building. That the evidence presented was insufficient to establish beyond a reasonable doubt that the corporate premises of Rickard & Davis, Inc. was the subject of housebreaking. Failure to prove the corporative status entitled the appellant to an acquittal.

No evidence was presented by the owner of the motor vehicle to establish lack of consent or authorization.

The Government was allowed to place into evidence previous minor convictions of appellant which prevented the appellant from having a fair trial.

PETITION OF APPELLANT FOR REHEARING EN BANC
FROM JUDGMENT OF DECEMBER 6, 1967 BY THIS COURT
AFFIRMING LOWER COURT'S DECISION WITHOUT A
STATED OPINION

James L. Bundy, appellant, was charged with having committed the offenses of (1) housebreaking, (2) larceny and (3) unauthorized use of a motor vehicle.

At trial he was found guilty of housebreaking and unauthorized use of a motor vehicle and was found not guilty of the offense of larceny. The housebreaking count alleged that on or about August 10, 1966 the appellant entered the building of Rickard & Davis, Inc., a body corporate, with intent to steal property of another.

I

NO EVIDENCE WAS PRESENTED DURING THE TRIAL TO
ESTABLISH OWNERSHIP OF THE BUILDING OR THE BUSINESS

The appellant was charged by indictment of entering into the building of Rickard & Davis, Inc., a body corporate, with intent to steal property of another.

The Government did not call any official from the alleged corporation to establish ownership of the building or the business on the premises. There was a total lack of any evidence sufficient

to establish the corporate character of the owner of the property entered and/ or the business on the premises .

In Bord v. United States, 76 U.S.App.D.C. 205, 133F(2) 313, a conviction of housebreaking was upheld based on testimony of the assistant manager of the theater and a representative of Warner Brothers, testifying as to the incorporation of Warner Brothers and that it occupied the theater; the Warner Brothers' representative also identified an imprint of the corporate seal; and, it was shown that the Stanley Company of America, a Delaware corporation, paid taxes on the theater building.

The holding of the Bord case is to the effect that the owner or occupant of the premises may be proven by evidence which shows the corporation was de facto organized and acting as such.

In the present case, two employees of Rickard & Davis, Inc. were produced by the Government. One was a shop foreman and the other the sales manager. Neither testified concerning the identity and corporate character of the owner or occupant. No evidence ever was entered into the case which showed or tended to prove by "reputation" or any other means the corporate status of the owner and/ or occupant of the premises involved.

The failure of the Government to prove the identity and character of Rickard & Davis, Inc. as a corporation was the subject matter of objection by the appellant (Tr. 53). All essential allegations must be proven. They were not. Accordingly, the housebreaking conviction of the appellant must be reversed. Bord v. United States, 76 U.S.App.D.C. 205; Bimbo v. United States, 65 App.D.C.; 82 F(2) 852; 13 Am. Juris(2), Para. 37, Page 342.

II

THERE IS NO PROOF TO SHOW THE LACK OF CONSENT OR AUTHORIZATION OF THE OWNER OF THE MOTOR VEHICLE

D. C. Code 22-2204 provides that use of a motor vehicle without the consent of the owner shall be a violation of said code section. The owner of the car, Elizabeth V. King, never testified that her motor vehicle was used without her consent and in fact she never testified. Her son said she was sick and there is no formal record explaining her absence except the statement of her son.

That lacking the proof of no consent by the owner herself, the conviction of the appellant of having violated D. C. Code 22-2204 must be reversed. 32 Am. Juris., Para. 32, Page 908.

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PREVIOUS MINOR CRIMINAL CONVICTIONS PREVENTED A FAIR TRIAL

The sole and only purpose of the Government interrogating the appellant about his criminal record was to prejudice the jury against the defendant (Tr. 80). Ostensibly, the convictions were the subject of interrogation on the alleged grounds of credibility. The appellant should have been tried for the charges levied against him at the time of the trial and any reference to any previous convictions or involvement in any other criminal matter should not have been alluded to by the Government. Reference to same affected the substantial rights of the appellant and deprived him of a fair trial. Luck v. United States, 121, U.S.App.D.C. 151, 348 F(2) 763.

D. C. Code 14-305 says in effect that a person who has been convicted of a crime can testify but the fact of his having been convicted of a crime may be given in evidence to affect his credibility as a witness. The "crime" referred to in that code provision appears to refer to offenses felony in character involving moral turpitude. Clawans v. District of Columbia, 61 App.D.C. 298, 62 F(2) 383.

The convictions put into evidence by the Government were that of simple assault and petty larceny. Such insignificant matters should not be allowed into the case so as to prejudice the rights of the appellant and deprive him of a fair trial.

IV


CERTIFICATE OF COUNSEL AS PROVIDED
BY U. S. APPEALS D. C. RULE 26(a)

Undersigned counsel for appellant certifies as provided by U. S. Appeals D. C. Rule 26 (a) that this petition for rehearing is presented in good faith and not for delay.

CONCLUSION

Wherefore, this Court en banc reconsider its judgment of December 6, 1967 and reverse the judgment of the Trial Court and remand the case to the Trial Court with instructions to enter a judgment of acquittal.

Respectfully submitted,



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Attorney for Appellant
(Appointed by this Court)

January 5, 1968

CERTIFICATE OF SERVICE

This is to certify that there has been hand delivered, this 5 day of January, 1968, to the United States Attorney a copy of the foregoing petition. A copy of the within petition is also being mailed to the appellant at 200 - 19th Street, S. E., Washington, D. C. and to his mother, Mrs. Lorraine Goff, at 617 - 15th Street, N. E., Washington, D. C.

Benjamin F. Rossner
Benjamin F. Rossner

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